IN THE SUPREME COURT
OF THE UNITED STATES

LOUIS BOYCE and FRANCISCO SOLIMENE,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT

State of New York)
County of New York) ss:

THEODORE KRIEGER, being duly sworn, deposes and says:

I am the attorney for the Petitioners herein, LOUIS BOYCE and FRANCISCO SOLIMENE, and respectfully submit this affidavit in support of an application that this Court allow the filing of the instant Petition for Certiorari.

That your deponent has heretofore submitted an application for an extension of time in which to file the Petition for Certiorari, which application was denied by Mr. Justice Marshall on the ground that it had failed to comply with Rule 34(2) of the Rules of the Supreme Court.

That your deponent respectfully prays that the instant Petition be accepted for filing inasmuch as your deponent was under tremendous pressure in the trial of *United States of America v. William Rizzo, et al.* in the United States District Court for the Southern District of New York. That your deponent, who had been assigned to represent an indigent co-defendant, i.e., William Benjamin, was actively and continuously engaged in the trial of said case from March 21, 1973 through April 4, 1973. That prior thereto your deponent was completely involved in the preparation for the trial of the aforesaid complex case.

That your deponent prays that the petitioners, each of whom is serving a prison sentence of fifteen (15) years, be afforded the opportunity of having this Petition for Certiorari determined on the merits thereof.

WHEREFORE, your deponent prays that the instant application be granted.

s/Theodore Krieger

[Sworn to April 13, 1973]

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1972

No.

LOUIS BOYCE and FRANCISCO SOLIMENE,
Petitioners,

-v-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Louis Boyce and Francisco Solimene, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 7, 1973.

OPINION BELOW

The Court of Appeals for the Second Circuit did not render an opinion nor did the District Court for the Eastern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 7, 1973. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

An application for an extension of time to May 4, 1973 to file the instant petition was mailed to this Court and to the Solicitor General. However, this Court did not receive the same although mailed Special Delivery and Air-Mail, but the Solicitor General did receive his copy. In view of the said postal mishap coupled with the belief that the instant appeal is meritorious and not dilatory, it is prayed that this Court will assume jurisdiction.

QUESTION PRESENTED

Did the Trial Court comply with Title 18, United States Code, Section 3500 when it refused to furnish petitioner's counsel with a copy of questions put to and answers anticipated from the main prosecution witness arising from repeated pre-trial interviews?

STATEMENT OF THE CASE

The petitioners, Louis Boyce and Francisco Solimene, were charged by indictment with one count of conspiracy to violate 21 U.S.C. §846. They were tried before Judge George Rosling and a jury in the United States District Court for the Eastern District of New York. The petitioners were convicted as charged and each was sentenced to imprisonment for fifteen (15) years and a special parole term of ten (10) and fifteen (15) years respectively.

Each petitioner is serving said sentence at the Federal Prison at Leavenworth, Kansas.

On March 7, 1973 the judgment was affirmed without opinion by the United States Court of Appeals for the Second Circuit.

STATEMENT OF FACTS

The proof as adduced by the Government in support of the indictment can be synthesized in the following narration.

Joseph Ania, an inspector in the United States Customs Service, testified that on July 8, 1971, he was a roving inspector at the International Arrivals Building at Kennedy Airport. He was approached by one Raphael Richard who claimed diplomatic immunity. Ania then asked for his customs declaration and noticed that it was improperly processed. Specifically, that although Richard had a Panamanian diplomatic passport his visa was that of an ordinary visitor.

Richard's luggage was thereupon searched and found to contain one hundred and fifty-five (155) pounds of heroin.

Paul Boulard, a Special Agent of the Bureau of Customs, testified that thereafter Richard began to cooperate. They then proceeded to the Hotel McAlpin where the luggage was placed in a rented automobile.

On the following day, the car was claimed by Cesar Altimirano who was arrested.

Amerigo Altamirano testified that he had previously been convicted of conspiring to possess one hundred and fifty-five pounds (155) of heroin with the intention of distributing the same, and had been sentenced to imprisonment for two (2) years.[1] He related that he had known Felice Bonnetti for some six or seven years and had met him in May of 1971. Initially, Bonnetti related that he was smuggling watches and that Altamirano could help in the delivery thereof. But thereafter Bonnetti was alleged to have said that he was smuggling heroin. Moreover, that Bonnetti had introduced him to the appellant Solimene on the same day at the Monte Tecla Restaurant. At that time Solimene had a parcel which he gave to Bonnetti. Thereafter, the three went to Bonnetti's room in the Paramount Hotel where the parcel was opened and allegedly contained Two Hundred Fifty Thousand ($250,000.00) Dollars in cash.

Altamirano further testified that he knew Joseph Averso,

1. The Altamiranos were indicted and convicted with Jose Francisco San Martin, whose conviction was affirmed by this Court on November 10, 1972, Docket No. 72-1481. San Martin, Americo Altamirano, Cesar Altamirano, Rafael Richard, Guillermo Gonzalez, Hector Castro, and Carlos Ramirez, were all named as co-conspirators in the instant prosecution.

having met him on the day subsequent to his meeting with Bonnetti. He also stated that he knew the appellant Boyce having met him some ten days after his introduction to Averso. This meeting was alleged to have occurred on the street outside of Averso's apartment, and he testified that he saw Boyce leaning against a car. He was then introduced to him by Averso, with the latter saying "this is my companion, associate."

The witness further related that he met the appellant Solimene at the International Club and thereafter went to the Hotel San Moritz. There he met Hector Castro, Carlos Ramirez, Felice Bonnetti and another person known as "Caesar". At this meeting, which had been prearranged in Altamirano's presence, Averso stated that he wished to purchase all of Bonnetti's merchandise.

The witness further related that Felice Bonnetti said that Solimene belonged to the family and represented Averso and Boyce. Thereafter Bonnetti said that the price would be as before save that he wanted large bills and immediate payment. Further discussions were had as to the delivery of approximately 200 kilos per month. Moreover Bonnetti was alleged to have said that Solimene was to go to Argentina inasmuch as he, Bonnetti, had a passport problem. Solimene argued but stated that he had to be apprised as to the time of his departure.

Thereafter, Altamirano and Solimene went to Averso's apartment where they met the latter and Boyce. Altamirano and Solimene then informed Averso as to what had transpired and Averso spoke to Boyce in English. Boyce was alleged to have replied "O.K., O.K., very good."

On the following day Altamirano again went to Averso's

apartment and thence to the St. Moritz Hotel. There they met Hector Castro, Carlos Ramirez, and Felice Bonnetti and proceeded to Kennedy Airport where the aforenamed departed for Argentina.

Some two weeks later both Altamiranos were at Averso's apartment when Averso had a telephone conversation. He then stated that Bonnetti had called from Rome, that he was going to Argentina, and that everything was ready. Further, that they should wait a few days for his call.

Felice Bonnetti did call and stated that Averso should go to Argentina and stay at the Diplomat Hotel in Buenos Aires where he would be picked up. Altamirano transmitted this message to Averso and the latter thereupon called Solimene and Boyce.

Boyce and Cesar then arrived at which time Averso informed Boyce of the conversation that Altamirano had had with Bonnetti. Boyce again said "O.K., very good" and left. Solimene then came to the apartment and Averso told him that he should get ready to travel. Solimene assented and asked whether Boyce knew about it. Averso replied that he had spoken to Boyce and that the latter had agreed to Solimene making the trip.

They then agreed to meet on the following Monday at Averso's apartment. Averso was present and Altamirano asked as to Solimene's whereabouts. He was informed that he had left. Altamirano then stated that he had a letter that Solimene was to give to Bonnetti. Averso and Altamirano then went to Kennedy Airport. There they met Solimene who stated that Boyce had driven him to the airport. Solimene purchased a

round trip Pan American ticket to Argentina and the letter was given to him.

During Solimene's absence, Boyce made daily visits to the apartment. On one occasion he paced up and down and Averso told him "Hey, Luigi, don't worry about, we are professional," to which Boyce was alleged to have smiled and said "yes, yes."

During this period "Eddy" called and said that Altamirano and Averso were to go at once to the Sheraton Park Hotel. They did so and went up to his room. There "Eddy" was alleged to have stated that fifty-three (53) kilos of heroin were arriving from Miami by car and when it did so he would telephone them at their apartment. This shipment was admittedly not the subject matter of Solimene's trip to Argentina. Objection was promptly taken thereto, a motion was made to strike and for a mistrial, all of which were denied.

Eddy did call on the following day and told Altamirano to go to the hotel. The latter did so where he received a key and a ticket and was informed that he, Eddy, was waiting for the money.

Altamirano then returned to Averso's apartment where the latter and Boyce were present. Averso thereupon stated that Eddy need not worry about the money since Boyce had it.

Altamirano was then told to get the car at a parking lot, pick up Boyce who in turn would drive, and then leave.

Altamirano was then told to get the car at a parking lot, pick up Boyce who in turn would drive, and then leave.

Altamirano did so, noticing that the car had Florida license plates, and thereafter returned to Averso's apartment. There he told Averso that he had followed his instructions. Cesar and Altamirano then took Eight Hundred and Eighty Thousand ($880,000.00) Dollars from a suitcase, made a parcel of it and put it in a shopping bag.

Thereafter Averso, who was carrying the shopping bag, Altamirano and Boyce went to the car that Altamirano had driven. They drove to the Sheraton Park Hotel and gave the money to Eddy, and Altamirano returned the car to the parking lot. This entire transaction took place while Solimene was in South America.

Pointedly, Altamirano conceded that he never saw anyone open up the trunk of the car, nor put anything in it or ever removed anything therefrom.

This testimony was again the subject of a motion for a mistrial on the grounds of irrelevance and inherent prejudice. It was likewise denied.

In the early part of July, 1971, Solimene, the two Altamiranos and Averso were at the latter's apartment. Solimene said that the trip had gone well, i.e., that he had arrived in Argentina, went to the Diplomat Hotel and had been picked up by Bonnetti, Edgar Castro and Jose San Martin. He also is alleged to have stated that San Martin was introduced to him as the person who was going to work with them in New York, and that he would arrive on July 6th. Solimene also stated that he went to Uruguay together with Bonnetti and San Martin. There they took rooms in different hotels and on the following morning met at a pastry shop in Montevideo,

Uruguay. They were then joined by Armando Nicolai and Solimene gave Averso's coded telephone number to San Martin. It was agreed that the latter, while in New York, was to stay at the Hotel Edison.

On July 8, 1971, Averso, Solimene, San Martin and Altamirano met, Solimene introduced San Martin to Altamirano and Averso said that he was one of the owners of the merchandise. San Martin stated that he had been informed that seventy (70) kilos of heroin were arriving on the following day, and that the person bringing it was going to call him. He would then in turn call Averso and the money should be ready. Averso reassured him and told him not to worry because it was an organization of professionals.

On July 9th Altamirano called Averso and said that he was going to his apartment. Averso told him not to, but rather to meet San Martin at the Hotel Edison. Altamirano did so. While there San Martin received a telephone call, stated that everything was ready, that Altamirano should go to Averso's apartment and that he in turn would thereafter telephone Averso. Altamirano went to the apartment where he met Averso and his brother Cesar. He then related his conversation with San Martin. Averso then telephoned and said "Hello, Luigi, everything is O.K." He then made another call saying that Carlos would pick up the car containing the heroin.

Some ten minutes later Solimene arrived at Averso's apartment. Averso told Solimene that the merchandise had arrived and that he should go to Luigi and tell him to bring the suitcase with One Million ($1,000,000.00) Dollars. Thereafter Solimene left.

San Martin then telephoned and told Altamirano to go to the hotel. Averso, upon being told, informed Altamirano to go to San Martin where he would get the parking ticket and the key for the car trunk. He then met San Martin who gave him the parking ticket and told him that the key was in the parking lot. Moreover that Averso should have someone immediately get the car.

Altamirano then went to Averso's apartment where he met Averso and his brother Cesar. Averso asked Altamirano to pick up the car but he refused. Cesar Altamirano then said that he would and was arrested while doing so.

On cross-examination Altamirano admitted that he began to cooperate with the Government only after an adverse jury verdict had been rendered. That his cooperation was made known to the Court and he was sentenced to imprisonment for two (2) years.

Altamirano testified that he was a self-employed salesman of sundries. He had no specific working hours nor could he recall where he purchased his merchandise save that it was from several Canal Street stores. He sold only to Spanish speaking people in the Bronx but was unable to give the name of even one customer.

Altamirano admitted to using cocaine, paid no income taxes or monies obtained as a salesman, and that he had not been prosecuted for possession of the cocaine that was found on his person at the time of his arrest.

Linda Cabral, Averso's girlfriend, testified that Averso did live at 310 West 47th Street during the first seven months of

1971, and a telephone therein was listed under her name.

Mortimer J. Silvers, the agent of the premises at 310 West 47th Street, testified that he had his office on the ground floor thereof. That a lease had been entered into with Averso as to Apartment 6B therein but conceded that he had never seen the appellant Boyce enter into or leave the premises.

William McMullan, a Customs Agent, testified as to the placing of the contraband subsequent to its seizure in an automobile at the parking lot and the actions of Guillermo Gonzalez and Jose San Martin. Likewise as to post-arrest statements made by Solimene, i.e., that he had gone to South America in June, 1971, via Pan American Airlines, that he had stayed at the Diplomat Hotel in Buenos Aires, Argentina, and that he had returned in early July via Argentina Airlines from Rio de Janeiro. Solimene also acknowledged having a United States passport in his apartment which had been seized pursuant to a search warrant.

E. Meade Feild, another Customs Agent, testified as to conversations with Guillermo Gonzalez and surveillance of Jose San Martin prior to the arrest of Americo Altamirano.

Kenneth Keefe, a Customs Agent, described the events leading up to the arrest of San Martin.

Gerard T. Whitmore, a Customs Agent, described the facts and circumstances surrounding the execution of the search warrant of Solimene's apartment. He further testified as to the notations and markings on Solimene's passport.

Leonard J. Groffe, the credit manager of the Hotel St.

Moritz, testified that according to the records of the hotel, Hector S. Castro had registered on May 26, 1971 and departed on May 29, 1971. Moreover that Carlos Ramirez had joined him on May 28, 1971.

Lee Vollmer, a Special Agent of the Bureau of Narcotics and Dangerous Drugs, testified as a surveillant agent, to the passing of a piece of paper on July 9, 1971 between Guillermo Gonzalez and Jose San Martin.

Elma Giacopasi, the Office Manager of Herbert Levine Incorporated, testified as to Altamirano's former employment.

James B. Robbins, the resident manager of the Hotel Edison testified as to the registration therein of Jose San Martin from July 6 through the 9th, 1971.

Trenton Barry Fleming, a special assistant to the passenger service manager, testified that the records of Pan American Airways indicated that on May 29, 1971 Bonnetti flew from New York to Buenos Aires.

Thomas F. Prengergast, an investigator for the New York Telephone Company, testified that according to company records, calls had been made between June 20th and July 9th, 1971, from Averso's apartment, a number which was subsequently shown to be the residence of Boyce's prospective mother-in-law.

Raymond Martinez, a traffic supervisor for Argentine Airlines testified that according to their records Hector Castro and Carlos Ramirez, who had been staying at the St. Moritz Hotel, left New York for Buenos Aires on May 29, 1971.

Furthermore, that Felice Bonnetti, who had likewise been staying at the St. Moritz Hotel, had cancelled his reservation.

Michael Tobin, a special agent of the Bureau of Customs for almost two years, and prior to that a New York City Police Officer for fifteen (15) years, narrated his qualifications as a "narcotics expert". These included almost fourteen (14) years service as a detective in the Narcotics Squad, during which time he purchased heroin in an undercover capacity. He related that he had made some five hundred (500) purchases of narcotics. Additionally, as a Customs Agent he had been involved in eight major narcotics seizures and had previously testified as to the value of heroin. He thereupon stated over objection that the approximate retail value of the 70 kilos seized would be $35,000,000.

A motion for a judgment of acquittal at the conclusion of the Government's case pursuant to Rule 29(a) was made and denied.

A motion under Rule 29(b) at the conclusion of the entire case was likewise made and denied.

The jury was thereupon charged by the Court and after deliberation returned a verdict of guilty as to both petitioners.

REASON FOR GRANTING THE WRIT

THE TRIAL COURT FAILED TO COMPLY WITH TITLE 18, UNITED STATES CODE, SECTION 3500, IN THAT IT REFUSED TO FURNISH DEFENSE COUNSEL WITH A COPY OF THE QUESTIONS PREVIOUSLY PUT TO AND ANSWERS ANTICIPATED FROM THE WITNESS AMERICO ALTAMIRANO.

Proper and timely demand had been made by defense counsel for Section 3500 material who in turn were apprised that there were none. The prosecutor then submitted twelve (12) numbered handwritten pages to the Court constituting questions and anticipated answers.

The Court examined the material in camera and then ruled that it need not be turned over to defense counsel, but that it would be designated as Court's Exhibit No. 1 and be impounded.

On December 1, 1972, more than six (6) months after the filing of the Notices of Appeal, the writer received by mail from the United States Attorney a zerox copy of the aforesaid exhibit together with an accompanying letter which are set forth in the appendix. It is submitted that the questions and answers were proper Section 3500 material and the failure to timely turn them over to defense counsel at trial constituted reversible error.

During trial the following colloquy transpired:

> "MR. KRIEGER: I respectfully make application to the Court that the Court request the United States Attorney to make available, if it does exist, any file as to Americo Altamirano currently in existence with the Bureau of Dangerous Drugs of the Department of Justice.

MR. BASHIAN: There is no such file.

THE COURT: There is no such file. All right, do you want to put Mr. Bashian on the stand or will you take his unsworn statement?

MR. KRIEGER: It's perfectly all right as to Mr. Bashian.

THE COURT: You have full liberty to inquire of Mr. Bashian concerning any notes that he knows about and include an inquiry as to his own notes.

MR. KRIEGER: Mr. Bashian has represented to this Court that he took no notes, which is more than ample.

THE COURT: Is that satisfactory?

MR. ROSENBERG: Absolutely.

THE COURT: Is that your representation, Mr. Bashian?

MR. BASHIAN: I'm sorry?

THE COURT: Is it your representation that you took no notes at these interviews?

MR. BASHIAN: I might have taken occasional jottings at several of the interviews.

THE COURT: Then you will submit those for in camera inspection to see whether they constitute a statement under 3500 subdivision E.

You prepared in connection with this case, did you not, some report which is a consolidation of what you have learned about it?

THE WITNESS: No, your Honor. On the original – the original case there was what we call a case report. After that, when we began working I never wrote an additional

report for the two defendants that are on trial now.

THE COURT: Well, the witness who is testifying now, Americo Altamirano, he did not testify at his own trial, but he was in fact tried.

THE WITNESS: Yes, sir.

THE COURT: Now, did you at that time in any type of report incorporate anything that he may have said under any circumstances?

THE WITNESS: No, sir. The only report being the complaint.

THE COURT: The complaint you mean to the magistrate in the prior case?

THE WITNESS: Yes – no, in this case.

MR. BASHIAN: I find that I have consolidated whatever notes I had into a final form of questions which I used yesterday at the trial, which I prepared myself, and which I used yesterday at the trial in questioning Mr. Altamirano. It consists of twelve numbered pages on legal paper written in my own handwriting.

THE COURT: Are these trial notes?

MR. BASHIAN: I actually used this yesterday in the questioning of mr. Altamirano.

THE COURT: Were they ever read back to him?

MR. BASHIAN: I don't understand the import of the question.

THE COURT: After you completed these notes, were they read back to Americo Altamirano for the purpose of seeing whether they were adopted or approved by him?

MR. BASHIAN: They are not exactly notes.

THE COURT: I see that they are all questions, at least on the first page.

Let me see if there are any answers.

MR. BASHIAN: That was never shown or read back to Mr. Altamirano, no.

THE COURT: I want to see if they are all questions.

The difficulty isn't with what Section 3500 Subdivision E in particular says as a statement required to be turned over. That is clear enough. Equally clear is what need not be turned over. It is a gray area in between concerning which Judge Friendly said in one of the cases that he cannot understand why the United States Attorney, after putting forth an enormous effort to obtain a conviction, risks reversal by withholding within the course of a trial doubtful 3500 matter which if turned over would not have affected the result.

So far I have looked at two pages and they all appear to be questions not answers.

The third page is the same, the fourth and fifth pages are all questions.

The sixth page is all questions.

As a matter of fact, you have the letter 'Q' in the left-hand column before each of those questions, so there is no doubt about the fact that they are questions. There are no 'As' or answers appearing. I am up to page 12 and I can say that I admire the technique which the Department has developed, and related Departments, of tearing up the notes and consolidating them into reports or not putting them into writing, and the United States Attorney's Office technique of putting everything in question form without answer.

All right, mark it as a court exhibit, please. It need not be turned over.

THE CLERK: Marked Court's Exhibit. Thank you, your Honor.

THE COURT: Yes.

MR. KRIEGER: Sir, might I request, respectfully, that the Court direct the Assistant United States Attorney to correspondent with the Bureau of Dangerous Drugs as to the pointed inquiry as to whether they have any files as to Altamirano.

THE COURT: Correspondence would delay the trial. Make appropriate inquiry and bear in mind the admonition that I have given you with respect to the effect of Brady v. Maryland, which has more force in my view – very often not always – than any 3500 material that might be produced." (Trial Transcript, pages 364-368)

An examination of the aforesaid material manifests that the Trial Court was in error when it stated that there were no answers. To the contrary there are forty-seven (47). Moreover, an analysis thereof demonstrates how they could be used for an impeachment and attack upon the credibility of Altamirano, the fulcum of the entire prosecution.

On direct examination Altamirano said that after Bonnetti told him that he was dealing in heroin they drove to 310 West 47th Street. Bonnetti then took a suitcase from the car and entered those premises. He thereafter returned with the same suitcase. But yet the answer set forth in Exhibit 1 makes no reference to it being the same suitcase.

On direct examination Altamirano stated that Bonnetti introduced "Eddy" to Averso and to himself. He stated that they were discussing the arrival of certain merchandise from Argentina and Averso gave his telephone number to "Eddy". He was also instructed that he was to call immediately upon the arrival thereof. Moreover he stated, "Ask for Jersey Joe." Yet

the answer in Exhibit 1 makes no reference to any of the foregoing save that Averso gave "Eddy" his telephone number.

Again on direct examination there was testimony as to a May 28, 1970 meeting at the Hotel St. Moritz at which time Hector Castro, Carlos Ramirez, Felice Bonnetti and an elderly man named "Caesar" were present. The answer in the exhibit contains no reference to "Caesar". Also on direct examination Altamirano said that Bonnetti described Solimene as "This boy belongs to the family here and he's representing Joey and Luigi". The answer previously given by Altamirano had to reference to "This boy belongs to the family here."

On direct examination Altamirano said that after Bonnetti introduced Solimene to the group they talked about 200 kilos per month "more or less". In the Exhibit there was no such qualification. Moreover the exhibit contained a statement as to 70 kilos per week, whereas there was no such reference in the direct examination. There was in addition no reference as to who specifically Solimene was to see in South America, save that he was "to be introduced to a person with whom he is going to work here." In the exhibit Bonnetti allegedly stated that Solimene was to go to "Buenos Aires to meet a 'contact man'."

In continuing the narration Altamirano related that after the meeting at the St. Moritz had terminated he and the appellant Solimene went to Averso's apartment where they met the latter and Boyce. Then Solimene and Altamirano explained what had transpired to Averso. This was done in response to a prosecutorial query as to the language "a little bit in Spanish, a little bit in Italian, because he speaks Sapnish quite well" (S.M. 267). But yet the exhibit in response to the query as to what

happened when they arrived at the apartment: "Francisco Solimene and I (Altamirano) tell Joe in Italian what took place."

Thereafter a conversation was alleged to have taken place between Averso and Boyce and at the termination thereof according to the direct testimony, the latter was alleged to have said to Altamirano in English, "O.K., O.K., very good." (S.M. 268) But the exhibit sets forth that the response was more laconic, i.e., "O.K."

Altamirano testified that he had a telephone conversation with Bonnetti from Argentina wherein the latter stated that Solimene's aunt had died. That Joe was to "send it" urgently to Argentina and that he was to stay at the Diplomat Hotel at Federal Capital, Buenos Aires. Furthermore, that he was to remain there until he was picked up to go to the funeral home and that everything was ready. However, the substance of the call as set forth in the answer was simply that Bonnetti was calling from Buenos Aires, his aunt had died, that Solimene should come down right away for the funeral and stay at the Diplomat Hotel.

Altamirano further related that after Averso had told Boyce in English the substance of the conversation with Bonnetti, Boyce said "O.K., very good." Yet the exhibit sets forth that the answer was "okay, Americo."

On page 295 of the transcript Altamirano testified that after Averso told Boyce not to worry that they were professionals Boyce smiled, put his hands in the back of his head, and said "yes, yes". However, the exhibit contains no reference to the double affirmative.

On direct examination Altamirano testified that at about noon on July 9, 1971 he was with San Martin at the Hotel Edison. While there the latter received a telephone call and thereafter told Altamirano that the person who was bringing in the heroin had called, that everything was ready, that he should go "urgently" to Averso's apartment to await a telephone call, and that San Martin would call the apartment immediately after he had seen the man. (T.R. 323)

Yet the exhibit makes no reference to San Martin having said that Averso should await a telephone call and that the former would call after he had seen the man. Moreover, the exhibit makes reference to an additional admonition "to get the $ ready" while the testimony does not.

On direct examination Altamirano related that he met San Martin on the street outside of the Edison Hotel. There he received a parking ticket and asked for the car key. The exhibit sets forth that he asked for "keys".

Altamirano further related that San Martin told him to go at once to Averso and tell the latter to send somebody to pick up the car." The exhibit sets forth that Averso was to pick up the car. Moreover a parking lot employee could steal the merchandise or call the police. Again the exhibit makes no reference to informing the police.

The prosecutor apprised the Court that he had made "jottings" prior to the time that Altamirano had testified before the Grand Jury. From these "jottings" a series of questions was formulated which were put to Altamirano before the Grand Jury. When his appearance before the Grand Jury was concluded, that series of questions was likewise destroyed, and all that remained was Court Exhibit 1.

The Court held that Exhibit 1 was a trial memorandum and ordered it impounded saying:

> 'IE COURT: I had my doubts as to the extent to which a trial memorandum of this nature, prepared by counsel, falls within the scope of 3500, subdivision (e), but I have almost invariably urged the U.S. Attorney – and the urgings were complied with – to make available to the defendant anything that read like a statement of the witness who was being examined, because I felt that such procedure is in the interest of justice, and where, however, the statement consists entirely of questions, as it does now – and this is the first time I have seen the statement in that form, it obviously doesn't qualify. And as I looked at those questions, it appears to me that I heard the questions put to the witness yesterday, and those are the questions.
>
> "I suppose a question might imply an answer, but it does not – it does not constitute an answer, and therefore I rule that after inspection of the document, that this does not qualify and I direct it be returned to counsel to be preserved against the eventuality of a possible conviction and an appeal, which is what the statute says." (T.R. 375-376)

An application to strike the testimony of Altamirano predicated upon the destruction of the notes was made and denied. (S.M. 461)

Initially it should be noted that the destruction of "jottings" and "series of questions" by a prosecutor is singularly different from notes taken by a law enforcement officer, then formulated into an intra-office report, compared and then destroyed. However, for the Trial Court to then say that the Exhibit 1 contained no answers, and was merely a trial memorandum to be kept secret from the defense and impounded by the Court is naught but prejudicial error.

It is submitted that the answers synthesized from the repeated governmental interviews of Altimirano constituted a statement under subparagraph (e) of 18 USC 3500. They were naught but a distillation of the witnesses own words compiled with the assistance of an interpreter and did constitute a verbatim narrative though couched in an interrogatory format.

The answers could not properly be designated by the Trial Court as a Trial Memorandum. It is submitted that they were statements properly within the coverage of Section 3500.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

THEODORE KRIEGER
Attorney for Petitioners Louis Boyce and Francisco Solimene
401 Broadway
New York, New York 10013
(212) WO 6-5911

Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of March one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. CHARLES EDWARD WYZANSKI, JR.
District Judge

United States of America,
Plaintiff-Appellee,

v.

Felice Bonnetti, Louis Boyce, a/k/a "Louie",
Francisco Solimene and Joseph Averso,
Defendants,

Louis Boyce, a/k/a "Louie" and Francisco Solimene,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

A-3

Letter from United States Attorney

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, N.Y. 11201

November 30, 1972

Theodore Krieger, Esq.
29 Fairway East
Sayville, New York 11782

Dear Mr. Krieger:

Enclosed is xerox copy of Court Exhibit No. 1, my questions and answers of Americo Altamirano, and a verbatim typed transcript of these notes. I have underlined, on the transcript, those portions of my notes which reflect the expected answers of Americo Altamirano.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By: s/ George G. Bashian, Jr.
George G. Bashian, Jr.
Assistant U.S. Attorney

Encls.

Questions and Answers Previously Impounded and Constituting Court's Exhibit 1

AMERICO ALTAMIRANO

Q. Name

Q. Age

Q. Of what country are you a citizen

Q. What languages you speak?

Q. Understand any English?

Q. Direct attn to May, 1971. In what city you living at that time?

Q. Did you know a Felice Bonnetti in May, 1971.

Q. For how long you know him

Q. Have occasion to see him in May 1971

Q. Where?

Q. About when in May was that?

Q. What time of day you meet him in International Club.

Q. Know Francisco Solimene.

Q. See him in Court.

Q. When first meet him? Where? What time?

Q. Who introduce you to him?

Q. What IA [if anything] did F.S. [Francisco Solimene] have with him in restaurant?

Q. What he do with it.

Q. What you and F.B. [Felice Bonnetti] do after F.S. [Francisco Solimene] gave packet to F.B. [Felice Bonnetti]?

Q. What F.B. [Felice Bonnetti] do in hotel room?

(2)

Q. You see what was in packet?

Q. Now, I direct your attn back to earlier in same day when you just met F.B. [Felice Bonnetti] at International Club. For how long you stay there?

Q. Where go to then?

A. To Paramount Hotel

Q. How long stay there?

Q. Then where go to?

A. Diplomat Hotel Bar.

Q. Have conversation there?

Q. What was it.

Q. What do then?

A. Drive car to 310 W. 47th St. F.B. [Felice Bonnetti] take suitcase in. He return with suitcase. Drive car back to lot, back to Paramount Hotel.

Q. What F.B. [Felice Bonnetti] do when you returned to Hotel.

A. Open suitcase, saw $, smell Heroin

Q. What IA [if anything] he say about $ at this time?

Q. Was it after this that you went to restaurant to meet F.S. [Francisco Solimene]

(3)

Q. Know Joe Averso

Q. When you first meet him?

Q. Where?

Q. Who introduce you?

Q. Anyone else present?

A. Eddie arrive

Q. Was Eddie introduce?

Q. By whom?

Q. What happen after introduction?

A. Joe gives Eddie his phone #

MARK PHOTO

Q. Show you photo, can you identify?

Q. Do you know Louie Boyce

Q. Point him out?

Q. When first meet him?

Q. Where?

Q. Who introduce?

Q. What IA [if anything] Joe Averso say when he introduce you to L.B. [Louie Boyce]

Q. Direct attn to 28 May 1971, you have occasion to see F.S. [Francisco Solimene] on that date?

Q. Where

Q. What do after meeting him there?

A. Go to St. Moritz Hotel

(4)

Q. Where in St. Moritz

Q. Who there?

Q. Was this meeting a "chance" meeting, or had it been arranged?

Q. Were you present when it was arranged?

Q. When?

Q. Where?

Q. Who present?

Q. Conversation?

Q. Was there a conversation that day at St. Moritz Hotel

Q. What was it?

A. Bonnetti introduce F.S. [Felice Solimene] to Castro and Ramirez. "He represents Joe and Luigi". B's [Felice Bonnetti] terms: 200 Ks per month, 70 Ks a week, payment in big bills and right away. F.S. [Francisco Solimene consents to terms. F.B. [Felice Bonnetti] tells F.S. [Francisco Solimene] that he'll have to travel to B.A. [Buenos Aires] to meet contact man.

Q. Did F.B. [Felice Bonnetti] say anything about price?

Q. What you and F.S. [Francisco Solimene] do after meeting over?

Q. Who present?

Q. What happen when you got there.

A. F.S. [Francisco Solimene] and I tell Joe in Italian what took place.

Q. What happen then?

A. Joe talks in English to Louie

(5)

Q. What happen when Joe finished talking in English to L.B. [Louie Boyce]

A. Louie says "okay". Make thumbs up sign.

Q. How long Louie stay

Q. Now direct attn to next day, May 29, 1971. You see F.B. [Felice Bonnetti] on that day.

Q. Under what circums

A. Joe and I drive to St. Moritz about 6:00 P.M., pick up Castro, Ramirez and Bonnetti, drive to JFK Airport.

Q. Where did you go to once get to JFK.

A. Castro and Ramirez to AA [American Airlines], Bonnetti to PAA [Pan American Airlines].

Q. Where Joe Averso living at this time

Q. Direct attn to time about 2 wks after St. Moritz meeting. You present then in apt at 310 W 47th

Q. Who else there?

Q. What happen?

A. telephone rang.

Q. Who answered.

Q. What brother do after he answered.

Q. About how long did Joe talk on phone.

Q. What, if anything, did Joe say after phone call.

Q. You present in apt a few days later

Q. Who else present?

(6)

Q. What occured?

A. Phone rang

Q. Who answered.

Q. Who on phone

Q. Have conversation?

Q. What was it?

A. He calling from B.A. [Buenos Aires]. Said his "aunt" had died, that F.S. [Francisco Solimene] should come down right away for funeral, stay at Diplomat Hotel.

Q. What you do after talking to F.B. [Felice Bonnetti]?

Q. What Joe do?

A. Place phone call.

Q. To who?

Q. How you know?

Q. What happen then?

A. Louie came to apt. Joe starts talking English to Louie. I interrupt him, ask what he's saying. Joe says he's explaining to Louie what F.B. [Felice Bonnetti] said?

Q. What, if anything, did Louie say after Joe finished talking English.

A. He says "okay, Americo"

Q. How long Louie stay

Q. What happen after he left

Q. F.S. [Francisco Solimene] arrived.

Q. Who in apt now

(7)

Q. Any conversation once F.S. [Francisco Solimene] arrives?

Q. Between who?

Q. What was the conversation?

Q. You make arrangements to meet? For when?

Q. Now, direct attn to following Monday, what happen on that day. Q. Have conversation

A. Go to apt. Joe says Louie already took F.S. [Francisco Solimene] to airport. Joe and Americo to airport, go to PAA [Pan American Airlines]. Sees F.S. [Francisco Solimenep, has

conversation, F.S. [Francisco Solimene] says Louie brought him to airport.

Q. What did F.S. [Francisco Solimene] do after you saw him at PA [Pan American Airlines] in airport.

Q. To you knowledge, did there come a time when F.S. [Francisco Solimene] returned to U.S.

Q. What was this

Q. For about how long was he away?

Q. Where you living during time F.S. [Francisco Solimene] was out of country.

Q. Anybody else live there?

Q. Ever see L.B. [Louie Boyce] during time F.S. [Francisco Solimene out of country?

Q. Where?

Q. How often?

Q. Ever any conversations when L.B. [Louie Boyce] came to apt?

Q. Between who?

Q. Remember any specific incident on any of these occasions when L.B. [Louie Boyce] came to apt?

(8)

A. Louie nervous. Joe says "Don't worry, we are professionals." Louie smile, puts hand behind head.

Q. Did there come a time when Eddie ever called apt?

Q. When was this?

Q. Who spoke to him?

Q. What you do?

A. Go to see Eddie at Sheraton-Park with Joe

Q. Was there a conversation.

Q. How long stay.

Q. See Eddie again?

Q. When?

Q. Where?

Q. What happen when you saw him?

A. He give keys and parking ticket to me

Q. He say anything when he gave these things to you?

Q. What you do?

Q. Who was present?

Q. Any conversation?

Q. What?

A. Joe gives me instructions, etc.

Q. Where Louie when Joe giving inst.

Q. What you do then?

A. Go out with Louie he asks for key, I get car, drive out, then Louie takes car

(9)

Q. What you do after Louie takes car.

Q. Who in apt?

Q. Any conversation

A. AA [Americo Altamirano] tell Joe everything ok. Joe tells Cesar to separate out $880,000.

Q. You see Cesar count $?

Q. Any $ left over?

Q. What you observe there?

A. See $ that Cesar counting

Q. What happen then?

A. Joe and I take $ to car, Louie wiping steering wheel. I drive car, we drop Louie off, take car to lot and $ to Eddie.

Q. When next time you see F.S. [Francisco Solimene]?

Q. Where?

Q. Who present?

Q. Any conversation?

Q. What? (See 10-12 of G.J. [Grand Jury])

(10)

Q. Direct attn to evening of 8 July 1971. Tell Jury where you were that nite?

Q. Who present?

A. Solimene, Averso, B.B. [Benito Brondarbit].

Q. Were you introduced to B.B. [Benito Brondarbit]?

Q. Who introduced you?

Q. What, if anything, did F.S. [Francisco Solimene] say when he introduced B.B. [Benito Brondarbit]?

Q. You see B.B. [Benito Brondarbit] in this courtroom?

Q. Was there conversation at this time?

Q. What was it?

A. "Merchandise will be here tomorrow, get $ ready"

Q. Now direct attn to 9 July 1971.

Q. You call Joe Averso

Q. What he say?

A. Go to Edison see how S.M. [San Martin] feel.

Q. Where were you at about mid day on 9 July?

Q. What happen?

A. phone rang, he spoke.

Q. What, if anything did B.B. [Benito Brondarbit] say to you after phone call.

A. That the person who was bringing the merchandise had called, that I should go tell Joey that everything was allright, to get the $ ready.

Q. What you do?

Q. How far Edison from 310 W 47th?

Q. Who present at 310 W 47th?

A. Joe, and Cesar.

Q. What you do when arrive?

(11)

Q. What happen after you talk to Joe?

A. Joe made phone call?

Q. Where you when he made call.

Q. You hear what Joe said?

Q. What he say?

A. "Luigi, everything is ready".

Q. What happen then?

A. Make 2nd phone call.

Q. What Joe say after 2nd call over?

Q. What happen then?

A. F.S. [Francisco Solimene] arrive

Q. Any conversation?

Q. What

A. Joe told him everything ready, he should go to see Luigi and Louie should bring the suitcase with 1 million dollars.

Q. What F.S. [Francisco Solimene] do?

Q. What happen after F.S. [Francisco Solimene] left?

A. phone rang

Q. Who answered?

Q. Who on phone?

Q. Have conversation?

Q. What?

A. He asked me to go urgently to Hotel, that he would wait for me by the door.

Q. What you do?

A. Tell Joe.

Q. What happen then?

A. Joe tells him to go to see S.M. [San Martin], he'll give Americo car key and ticket, just like Eddie did.

(12)

Q. What happen when you meet him?

A. He gives me parking ticket, no keys. I ask for keys, he was nervous, said the person had forgotten about them, he said "Go to Joey and tell him to go right away to pick up the car, because the F'ee [employee] who takes care of the parking lot could steal the merchandise".

Q. MARK FOR I.D.

Q. Can you identify.

Q. How.

Q. What you do after B.B. [Benito Brondarbit] give you ticket?

A. *Return to 310 W 47th St.*

Q. Who present?

A. *Joe Averso and Cesar*

Q. What happen then?

A. *Joey asked me to get car, offered $, I refused. Then I offered $ to Cesar, Cesar agreed.*

Q. What you do then?

Q. Were you arrested?

Q. Where?

Q. Who was supposed to bring the $ for the heroin

Q. Approx how much was it?

(13)

Q. Who was the $ to be ultimately paid to?

Q. How $ supposed to get down South?

Q. Mr. Altamirano, were you indicted for conspiracy to possess 155 lbs of heroin with intent to distribute?

Q. Were you found guilty?

Q. Were you sentenced by the Judge?

Q. What was your sentence?

Q. Why you go with Cesar

Q. What would have happen if no arrest?

Q. Where Park-Sheraton

Q. What room in Park Sheraton Where Diplomat Hotel

Q. Know where Louie lived?

PASSPORT

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1392

LOUIS BOYCE AND FRANCISCO SOLIMENE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were entitled to receive certain notes made by the prosecutor to serve as a guide in interrogating a government witness at trial, which they contend constituted a "statement" within the meaning of 18 U.S.C. 3500(e).

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having conspired to smuggle into the United States and to possess with intent to distribute 155 pounds of heroin in violation of 21 U.S.C. 846. They were sentenced to fifteen years' imprisonment. The court of appeals affirmed (Pet. App. A1-A2).

1. Evidence at trial established that petitioners, co-defendants Averso and Bonetti, government witness Americo Altamirano, and others participated in a major

conspiracy to smuggle large quantities of heroin into the United States from South America. Specifically, the evidence showed that the conspiracy consisted of two groups, of which petitioners and Averso were the architects of the "receiver" group, which purchased heroin directly from the "supplier" group, which was headed by Bonetti and was based in South America. On July 8, 1971, co-conspirator Rafael Richard was arrested at Kennedy Airport in possession of 155 pounds of heroin, destined for the "receiver" group, as Richard tried to enter the United States from Panama with a diplomatic passport (R. 142-178).

2. After Altamirano, the chief government witness at petitioners' trial, testified on direct examination, the prosecutor proferred to defense counsel a copy of Altamirano's grand jury testimony. At that time he advised defense counsel that there were no other Altamirano statements to which defendants were entitled under the Jencks Act, 18 U.S.C. 3500. (R. 350.) Thereafter, the prosecutor was asked by the court whether he had taken any notes during his interviews of Altamirano. The prosecutor replied that he might have taken "occasional jottings at several of the interviews" and that from these jottings he had prepared a series of questions which he asked Altamirano before the grand jury (R. 364, 374). The prosecutor further explained that he discarded the jottings and grand jury questions and prepared 12 pages of trial notes, which he had used at trial in questioning Altamirano (R. 366, 374). These trial notes, consisting of 198 questions and 47 *expected* answers (See Pet. App. A3-A13), were submitted to the court for an *in camera* examination. During the *in camera* examination, the court asked the prosecutor whether the notes were ever read back to Altamirano for his adoption or approval and the prosecutor answered

"no" (R. 366). Subsequently, the court ruled that the notes did not qualify as a "statement" under 18 U.S.C. 3500 (R. 375-376).

3. Petitioners contend that the court's failure to furnish defense counsel with the prosecutor's trial notes violated the provisions of 18 U.S.C. 3500. However, these notes, prepared by the prosecutor as a guide in questioning Altamirano at trial, clearly do not constitute a "statement" of a witness as defined in 18 U.S.C. 3500(e). See *Campbell* v. *United States*, 373 U.S. 487; *Palermo* v. *United States*, 360 U.S. 343; *United States* v. *Goldenstein*, 456 F. 2d 1006 (C.A. 8); *United States* v. *Myerson*, 368 F. 2d 393 (C.A. 2), certiorari denied, 386 U.S. 991; *United States* v. *Aviles*, 337 F. 2d 552 (C.A. 2), certiorari denied, 380 U.S. 906. The notes were not statements "adopted or approved" by Altamirano (18 U.S.C. 3500(e)(1)), nor "substantially verbatim" recitals of Altamirano's oral statements made "contemporaneously" to such statements (18 U.S.C. 3500(e)(2)), nor a statement made by Altamirano to the grand jury (18 U.S.C. 3500(e)(3)). As noted by the United States Court of Appeals for the Second Circuit, "courts * * * must also be meticulous in satisfying themselves that what is made available truly represents the witness' own statements." *United States* v. *Aviles*, *supra*, 337 F. 2d at 559.

Moreover, the fact that the trial court did not notice that the notes contained expected answers, is irrelevant to a determination of whether or not these notes constituted a witness' "statement" under 18 U.S.C. 3500 since there is no showing that these answers were approved or adopted by the witness.[1]

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[1] In any event, the minor variations between the answers expected and those actually given upon which petitioners rely (Pet. 18-23) were not significant, and reflected primarily the brevity of the notes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

DOJ-1973-06